United Nations A/C.6/52/SR.24

General Assembly
Fifty-second session

Official Records

Distr.: General
25 November 1997

Original: English

Sixth Committee

Summary record of the 24th meeting
Held at Headquarters, New York, on Friday, 7 November 1997, at 10 a.m.

Chairman: Mr. Tomka ..... (Slovakia)

Contents

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

97-82631 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session *(continued)* (A/52/10)

1. **Mr. Yamada** (Japan) said, with regard to State responsibility, that the International Law Commission had been right to give priority to the topic by deciding to complete the second reading of the draft articles by the end of the current quinquennium. The piecemeal presentation of draft articles to date had made it difficult for Governments to provide consistent comments, but, following the completion of a set of draft articles on first reading, his Government had formed a group 12 scholars of international law who would make recommendations.

2. Meanwhile, his Government was considering certain key issues. the first was the lack of requirement of damage, and the omission of fault and negligence in draft article 1. The second, was the inclusion of the concept of international crime in draft article 19: it should be determined whether the concept of State crime had been sufficiently established in international law and, if so, whether a separate regime from that of civil responsibility was called for. Thirdly, with regard to circumstances precluding wrongfuiness, the question was whether such circumstances, with the exception of countermeasures and self-defence, should preclude responsibility rather than wrongfulness; if not, there might be an inconsistency between draft articles 1 and 35. Fourthly, there was the question of limitation on countermeasures, in particular conditions relating to the resort to countermeasures against international crime. The last point was dispute settlement, including compulsory arbitration.

3. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation endorsed the Commission's decision to study first the prevention of transboundary damage from hazardous activities. Although some Governments viewed international liability as the core issue, the Commission had failed over the past 20 years to define the scope and content of the topic, so it would be better to start with what was possible and practicable. Within that framework, the Commission should confine its work to transboundary damage and to activities having a risk of causing harm. The broader issues of creeping pollution and global commons should be excluded, at least initially.

4. With regard to diplomatic protection and unilateral acts of States, Japan would do its best to provide relevant information, following the Commission's clarification of the scope and content of those topics.

5. With regard to the work programme of the Commission for the remainder of the quinquennium, his delegation hoped that the work would proceed as outlined. In 1998 the Commission was expected to select topics for its long-term programme of work. That placed an obligation on the General Assembly to provide topics for the commission for the following quinquennium. Much had been said of the need for close interaction between the Assembly and the Commission. The codification and progressive development of international law was a joint exercise, and his delegation hoped that the momentum generated during the current session would enhance the dialogue between the General Assembly, Governments and the Commission.

6. **Mr. Fozein** (Cameroon) said that the Commission's report showed that the topic of reservations to normative treaties, including reservations to human rights treaties, still aroused considerable controversy on both legal and political grounds. The main question at issue was the right of States to assess any treaty before they committed themselves to be bound by the Vienna Conventions. The Commission's Preliminary Conclusions seemed to be moving in the right direction: they did not cast doubt on the Vienna regime, which had done much to democratize international relations in a world in which the law of force seemed to be taking the place of the force of law. The flexibility and adaptability of the system of reservations contained in the Vienna Conventions of 1969, 1978 and 1986 had ensured its effectiveness, making it acceptable to its intended users.

7. It was claimed in some quarters that allowing States to make reservations to treaties led to the destabilization of the law, which could be a matter of particular concern where normative treaties were concerned. A legal regime should therefore be established, the argument ran, to deal specifically with treaties in order to guarantee their integrity.

8. His delegation believed that that argument was misguided because it ignored the fact that the essentially supplementary nature of the Vienna regime left a variety of interpretations open to States. Yet the practical consequences of flexibility must be viewed with caution. The great diversity of areas covered by codification agreements put normative treaties into a special category, so that any demand for special treatment where reservations were concerned might give rise to a rash of difficult legal regimes to accommodate the specificities of each area. That would weaken the law of reservations to treaties rather than strengthen it. Lastly, the argument took too little account of the decentralized nature of international society, which led

States to prefer a flexible regime to a straitjacket that deterred them from making any commitment at all.

9. A State's right to make reservations to a treaty under the Vienna Conventions was not, however, absolute; it could only make reservations that were not incompatible with the object and purpose of the treaty. That criterion seemed sufficient to safeguard the integrity of a treaty, given that it applied when reservations were prohibited or declared impermissible. Reservations relating to peremptory norms or rules of *jus cogens* were clearly prohibited. However, it was up to the parties to specify in the treaty the provisions to which reservations were impermissible. Both the integrity of the treaty and the universal participation of States could thus be preserved in all categories of treaty.

10. His delegation therefore endorsed the first three of the Commission's Preliminary Conclusions. All that was required was for the criterion of compatibility to be spelt out more precisely. The uniformity of the reservations regime would also benefit if the Commission clarified the law applicable to treaties when a reservation was accepted or objected to, or when an interpretative declaration was made by one of the parties.

11. The problem of permissibility was not, however, confined to the criterion of the compatibility of reservations with the object and purpose of a treaty; there remained the question of who was competent to determine permissibility. Cameroon agreed with the advisory opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, which stated that permissibility was for the States parties alone to determine. Some human rights treaty monitoring bodies tended to set themselves up in judgement over the permissibility of reservations by States, but legally they were on shaky ground. It was doubtful that the theory of implicit competence meant that competence could be transferred from Governments to international organizations or that it allowed such organizations, in the absence of a mandate to that effect, to judge the intentions of Governments. If, however, human rights treaty monitoring bodies were vested with powers to make binding decisions, as was the case with some regional bodies, the theory of implicit competence could be invoked.

12. In all other cases, though, it was not for monitoring bodies to assume powers greater than those conferred on them by States. The Commissions' fifth Preliminary Conclusion was therefore unacceptable, and it was in any case contradicted by the seventh, with which Cameroon was in full agreement. His delegation also supported the other Preliminary conclusions. It hoped, however, that the Commission would ultimately come up with a guide to practice on reservations to treaties, possibly in the form of a resolution.

13. With regard to State responsibility, his delegation had commended the Commission's work in 1996, but had also made some constructive comments on the concept of State crimes and delicts, countermeasures and the settlement of general disputes. He recalled his delegation's view that the recognition of international delicts ought to have been accompanied by legal consequences. The draft articles were silent on that point, and the Commission should spell out whether it considered that such offences had no international consequences or whether they were governed by the ordinary law of State responsibility. On the other hand, if a State that was victim of an international crime could claim restitution in kind, then depending on the economic stability and independence of the perpetrator State, the intended legal consequences might not achieve their aim. The objective of an international sanction should be reparation, not punishment; it should be a means of bringing the offending State into conformity with the rules of international law and making it repair the consequences of its actions, not of compromising its political independence or threatening its economic stability, still less of imposing suffering on its people. His delegation therefore reiterated its request for additional consideration, on second reading, of the legal consequences of the Commission's distinction between international crimes and international delicts.

14. With regard to countermeasures, his delegation, while welcoming the balanced approach adopted by the Commission, would prefer to see the scope of measures of constraint enlarged by deleting the words "economic" and "political" from the draft articles.

15. His delegation continued to believe that the procedure for the peaceful settlement of disputes outlined in the draft articles on that topic was complex and costly and should be reconsidered. At the very least, it should be left entirely to the parties to a dispute to choose the modalities of settlement they deemed most appropriate.

16. **Mr. Varšo** (Slovakia), speaking on the topic of nationality in relation to the succession of States, said that his delegation could accept the draft articles as they stood, since they corresponded to his country's thinking and practice. Slovakia's legislation on nationality, adopted in January 1993, was in line with recent practice in the international community. He wished only to stress certain general aspects of the topic, such as the relationship between international and national law. The codification and the progressive development of international law in the area of

nationality in relation to the succession of States required the harmonization and balancing of the interests of the principal actors: the international community, the State and the individual.

17. The interest of the international community was referred to in the first preambular paragraph of the draft articles, although the Commission's commentary simply referred to cases of succession of States and, in a footnote, to the resultant problem of statelessness. Further explanations of the international community's concern over those matters would have been useful.

18. The interest of States was dealt with indirectly in the second preambular paragraph, where it was stated that nationality was essentially governed by internal law, within the limits set by international law, thus implying the right of a successor State to legislate conditions for the acquisition of nationality. Since transfers of sovereignty, in themselves political rather than juridical, were conditioned by many factors, prudence should govern the approach of successor States in the granting of nationality, and in that they could be guided by the Commission's definition of nationality. Slovakia supported the principle of transmission of nationality as set out in the draft articles, the legal means that ought to be available to individuals seeking to acquire the nationality of a successor State and other relevant principles such as non-discrimination, the right to a nationality, the prevention of statelessness and respect for the will of persons concerned, all of which had been applied in recent cases of succession.

19. While an individual's right not to be rendered stateless and to opt for nationality at will had, of course, to be safeguarded, the concern of the individual in the matter had to be reconciled, as always, with the interests of the majority of the community and of the State. The third preambular paragraph struck a balance between those competing interests, as did the draft articles as a whole.

20. On the question of the relationship between the Commission and the Sixth Committee in the codification and progressive development of international law, which had been raised by the Chairman of the Commission in his introductory statement, he urged that all the parties concerned should assume responsibility for the current situation and endeavour to understand the underlying problems so as to adopt a sound strategy for the future. Member States always had the right to submit suggestions or proposals to the Commission. Thus in his delegation's view, the Commission should address, in order of priority, the topics of State responsibility, reservations to treaties, and diplomatic protection. The question of international liability for injurious consequences arising out of acts not prohibited by international law should be dealt with as an aspect of State responsibility, with an emphasis on prevention. Similarly, the Commission itself was free to submit regularly to Member States its analysis of different points of international law and to make pertinent suggestions. The topics chosen for the codification or development of international law should not be the result of random selection but should be identified on the basis of a careful study of all legal viewpoints.

21. **Mr. Gray** (Australia), referring to the topic of international liability for injurious consequences arising out of acts not prohibited by international law, said that his delegation had prepared written responses on technical issues arising from the different types of risks covered and from the relationship between articles 4 and 6 of the draft articles on the topic, which were the foundation for the later, more detailed articles 9 to 19.

22. Article 4 as currently drafted was broader than its predecessor, article B. Under a rubric of prevention that went beyond prevention of risk it now encapsulated three obligations: risk prevention *ex ante*, risk minimization *ex ante* and harm minimization *ex post*, the last of which, being related to transboundary harm that had actually occurred, might in some circumstances amount to prevention. Article 4 distinguished the occurrence of harm, which must be significant, from its effects, which might be minor. Thus, if article 4 was taken in conjunction with article 1 (b), the draft articles would apply to activities that did not involve risk of significant transboundary harm but did in fact cause it. It would be useful to clarify whether the last part of article 4 intended to impose an obligation to remove harmful effects; as drafted, some choice on the part of States could be implied, especially in conjunction with article 3, on freedom of action. In addition, the broad concept of prevention under article 4 was not commensurate with that under articles 9 to 19, on prevention or minimization of risk, being more closely related to that under articles 20 to 22, on compensation.

23. It should be noted that article 6, like article 4, drew a distinction between harm and effects, but referred to effects in both affected States and the State of origin. Clarification was needed as to whether both types of effects were also covered by the obligations in article 4, or only effects in affected States.

24. Articles 9 and 11 were both concerned with the question of authorization and should be placed together. The emphasis in article 11 could be strengthened by introducing the concept of good faith. Also, the introduction of a

temporal element, requiring reasonably prompt action on the part of a State in directing those responsible for pre-existing activities to obtain authorization, would reinforce the need for due diligence.

25. Under article 10 (risk assessment), the questions of who should conduct the assessment, what it should contain and the form of authorization were left to the State of origin to decide; it was in fact appropriate to avoid being overly prescriptive.

26. Articles 13 to 18 had to be considered in the light of international regimes governing more specific areas of activity. The purpose of article 13 was to require notification and transmission of information. As currently drafted, it also required a response, but that requirement might be more appropriately placed under article 14 (exchange of information) or article 17 (consultations on preventive measures). If, on the other hand, article 13 was to involve the exchange of information and not simply transmission and notification, then articles 13 and 14 could be combined under the title "Notification and exchange of information".

27. As to the general issue of the prevention of transboundary damage from hazardous activities, some activities might become hazardous only in conjunction with other activities, a fact that might necessitate an expanded exchange of information, a more liberal consultation regime and a broader assessment of risk that encompassed both the environment of other States and activities in those States. Similarly, the effects of transboundary activities in two States might combine to be felt in a third State, thus creating more than one State of origin.

28. On the general issue of international liability, the Commission should elaborate on joint liability arising from joint activities, and on associated issues including indemnities, rights of action and of inspection, dispute settlement principles and bodies, access, investigation and clean-up.

29. **Mr. Tiwari** (India) said that his delegation endorsed the procedure decided on by the Commission for consideration of the topic of State responsibility, as set out in paragraph 161 of the Commission's report.

30. Turning to the topic of international liability for injurious consequences of acts not prohibited by international law, he noted that the Commission had decided to accord priority to prevention. While his delegation had no objection to that approach, it felt strongly that establishing liability for injurious consequences emanating from such acts was of the utmost importance. Remedial measures were necessary in the event of failure of preventive action. The Commission should take account of contemporary practice in the field, which placed more emphasis on providing incentives, including capacity-building, to promote the observance of rules of due diligence. Implementation of the due diligence obligation should be made directly proportional to the scientific, technical and economic capacities of States. Failure to meet that obligation should entail enforceable legal consequences not involving economic or other sanctions.

31. His delegation welcomed the organizational method adopted by the Commission in dealing with the topics of diplomatic protection and unilateral acts of States. He agreed that the main thrust of the study of diplomatic protection should be to deal with the claims brought by States on behalf of their nationals against another State, but should not involve direct claims between States themselves. That approach conformed to the doctrine of diplomatic protection as developed in State practice and customary international law. Similarly, diplomatic protection should not overlap with the traditional diplomatic and consular protection clearly governed by the Vienna Conventions of 1961 and 1963. International case law, such as the decisions of the Permanent Court of International Justice in the Mavrommatis Palestine Concessions case of 1928 and of the International Court of Justice in the Reparation case of 1949, could also be of considerable assistance in approaching the subject. There was no doubt that a number of complex legal issues arose, including the claims of dual nationals, the possibility of parallel protection of claims by nation States or international organizations and class claims involving lump sum settlements for groups of persons. His delegation was convinced of the importance of the topic and its suitability for codification and progressive development.

32. The topic of unilateral acts of States was of current relevance, in view of the unprecedented increase in interaction between States and the frequency of unilateral acts which impinged on the vital interests of other States. He agreed with the Commission that the focus of the study should be on unilateral acts of States that were intended to produce legal effects. He looked forward to the initial report on the topic in 1998 and to the completion of the first reading of draft articles within the current quinquennium.

33. **Mr. Al-baharna** (Bahrain), referring to other decisions and conclusions of the Commission, said that his delegation endorsed the approach the Commission had taken in planning a five-year work programme for each of the topics on its agenda. With regard to methods of work, his delegation appreciated the Commission's stated intention to avoid repetition and reopening of issues in its debates, and felt that such discipline should be enforced especially in the

Drafting Committee. It disagreed, however, that the officers for subsequent sessions should be agreed upon in advance, because those members of the Commission who were still present at the end of a session would be working intensively to complete the agenda and finalize the report, and a proper election could not be organized under such circumstances.

34. For reasons of continuity and practical convenience, Bahrain also did not favour holding a split session as proposed. Moreover, it thought that the duration of the Commission's sessions was a matter that should be reassessed each year in the light of the volume of work. On the other hand, his delegation welcomed the Commission's wish to cooperate broadly with other United Nations bodies and suggested that the Commission might begin by consulting with the human rights monitoring bodies in connection with the topic of reservations to treaties. Bahrain supported the criteria for choosing new topics for the long-term programme of work, including topics that reflected new developments in international law and pressing concerns of the international community as a whole.

35. Lastly, members should not fail to note the gratifying tribute paid to the Commission by a representative of the International Court of Justice, describing its texts as eminently authoritative sources.

36. **Mr. Baker** (Israel) observed, with regard to chapter IV of the report (nationality in relation to the succession of States), that Israel constituted one of the relatively recent examples of State succession with an effect on issues of nationality. The Special Rapporteur for the topic and the Commission had rightly stressed the need to avoid situations of statelessness and to solve human rights issues incidental to State succession.

37. In the interests of consistency, the Commission had opted to define the expression "succession of States" in terms of responsibility for the international relations of territory, using the same formulation as in the two Vienna Conventions on succession of States. However, the issues of nationality relevant to the draft articles involved, to a much greater extent than in those other conventions, the internal legal bond between a State and individuals in its territory, rather than the international relations of the State. It would therefore be more logical and appropriate to define succession of States as the replacement of one State by another in the responsibility for the administration of the territory and its population.

38. The central presumption of article 4, that nationality was acquired by persons "habitually resident" in the territory affected by the succession of States, might be made subject not only to the other provisions of the draft articles but also to specific arrangements emanating from agreements between the States concerned, which would of course reflect relevant circumstances.

39. Article 10, concerning respect for the will of persons concerned, was regarded as central by the Commission. However, paragraph 2 of that article raised the question whether the obligation to grant such persons a right to opt for the nationality of the State concerned was compatible with the somewhat broad discretion the State had to determine the nature of the connection between such persons and the State. His delegation would be inclined to join those members of the Commission who had expressed preference for the well-established notion of "genuine link" rather than the more subjective, vaguer term "appropriate connection".

40. He questioned the need for the inclusion in such a declaration of article 13 (Status of habitual residents), as it might raise questions incidental to succession that were not directly related to nationality or the specific nature of the link between the State and the person concerned. The practical consequences arising from a status of habitual residency following a succession could be analysed in greater detail.

41. With regard to article 14 (Non-discrimination), he agreed that a prohibition against discrimination in dealing with nationality should, as a peremptory norm of international law, have a place in the draft articles. He concurred with those who considered that the illustrative list of criteria (race, colour, national or ethnic origin and religion) set out in the European Convention on Nationality should be restored to the text; otherwise, the prohibition could be interpreted as applying to broader criteria.

42. Article 18 (Other States) should be clarified, as it raised questions concerning the extent of freedom given to other States to determine questions of nationality.

43. Turning to chapter V of the report, specifically, the Preliminary Conclusions of the Commission contained in paragraph 157, he reaffirmed the integrity of the existing system for reservations to treaties set out in the 1969 Vienna Convention. The flexibility and adaptability of that system had been achieved only after considerable debate aimed at ensuring the broadest possible participation in treaties, while enabling States to record what they considered to be a basic national position, without prejudicing the object and purpose of the treaty. The process of bringing a treaty to a government and a parliament for ratification and accession necessarily involved subjecting the treaty to extensive constitutional, legislative and jurisprudential scrutiny. In some cases it became clear that a reservation was necessary

in order to harmonize the treaty obligations with the constitutional and legal framework of the State.

44. Such a decision was not taken lightly; in arriving at it, the question of such a reservation's admissibility and its compatibility with the object and purpose of the treaty were of the utmost priority. Under normal circumstances, only the reserving State itself was in a position to interpret and explain the nature of its reservation, the reasoning behind it and its compatibility with the treaty. No special monitoring body or regime could fulfil that function in the same way.

45. His country's practice had illustrated that problem. Upon acceding to various human rights treaties, Israel's constitutional structure, which was based on civil and religious norms governed by individual religious law, had required the Israeli Government to enter reservations reflecting the applicability of such religious laws *vis-à-vis* some provisions of the treaties. While monitoring bodies had called for a review of those reservations, the Israeli Government was of the opinion that they were not incompatible with the treaties concerned. He therefore joined those members of the Commission who had qualms about the formulation in paragraph 5 of the Preliminary Conclusions regarding the competence of monitoring bodies to comment upon and express recommendations with regard to the admissibility of reservations by States.

46. Paragraph 10 should include a suggestion that a reserving State should provide pertinent explanations concerning the reservation to another State or body before being called upon to modify or withdraw the reservation or to forgo becoming a party to the treaty; it was still unclear whether that provision even belonged in the text.

47. As to paragraph 12, he shared the concern of other delegations that it should not be understood as authorizing States to adopt tailor-made regional interpretative practices and rules which might depart from universally accepted practice based on the Vienna Conventions.

48. With regard to chapter VIII of the report, he welcomed the work accomplished by the Commission on the topic as a useful beginning. It was clear that the topic dealt with secondary rules involving the consequences of injury to nationals in the international sphere. The issues identified by the Commission under the four main areas (para. 189) opened up a vast field of study which in some cases covered matters dealt with by the Commission in other fields (nationality, genuine link and so on). He looked forward to the preliminary report to be based on the outline presented.

49. With regard to chapter IX, he was concerned that the Commission was embarking on a task of daunting proportions. All unilateral acts by States in the international sphere had legal consequences in one way or another. Paragraph 198 indicated the wide scope of the topic; it was unclear how any particular unilateral act could be extracted from a general field of international law and dealt with in isolation. Rather than using the expression "unilateral legal acts of States", as proposed in paragraph 207 of the report, it might be more accurate to refer to unilateral acts of States having international legal effects.

50. On the subject of the Commission's statute and membership, he noted that the Chairman of the Commission had called on the Sixth Committee for help and support with regard to the way in which the Committee elected the members of the Commission, the Committee being the only body authorized to amend the statute. In that connection, he recalled that the membership of the Commission was not intended to be based on political representation but to reflect the principal legal systems of the world. Unfortunately, under the current electoral method, which was linked to the regional group system, as set out in amended article 9 of the statute, his country's candidates were unable to participate, since a candidate from a State not connected to a regional group was excluded from the electoral process. That was a situation which deserved to be examined and rectified by the Committee. It was regrettable that persons eminently qualified to contribute to the development of international law should be prevented from doing so.

51. **Ms. Escarameia** (Portugal), referring to chapter IV of the report, said that she supported the approach of giving priority to questions related to natural persons over those connected with moral persons. Respect for the will of the persons concerned and the free choice of nationality was of crucial importance. She therefore strongly supported maintenance of the right of option in cases of succession of States and believed that it should apply to the maximum extent possible. That right was a powerful instrument for avoiding grey areas of competing jurisdictions.

52. She welcomed the embodiment in the draft articles of the principles of non-retroactivity of legislation, family unity and non-discrimination; the prohibition of arbitrary decisions concerning nationality issues; and the obligation of States concerned to take all reasonable measures to prevent statelessness. The solutions contained in article 4 and article 7, paragraph 2, relating to the presumption of nationality and the presumption of consent, were suitable.

53. In order to avoid misunderstandings, however, she would be grateful if an additional effort could be made to clarify such concepts as "appropriate connection" and "reasonable time-limit for the exercise of rights". Greater

detail would reinforce the protection of the right to a nationality as a human right

54. She was also strongly in favour of including in Part II a section providing for situations of decolonization. At the very least, the Commission's understanding, as reflected in paragraph (3) of the commentary on draft article 19, that the regime applied, *mutatis mutandis*, to such situations should be mentioned in the draft.

55. Turning to chapter V of the report, she stressed the fundamental importance which she attached to work on the topic, which was long overdue. While she did not wish to see any alteration of the principles embodied in the Vienna Conventions of 1969, 1978 and 1986, she believed that a higher level of clarification in that field was urgently needed. Under the current regime, it was often unclear which reservations were acceptable and what effects objections had on reservations and treaties. Each State thus became the sole judge of the compatibility of reservations with the object and purpose of the treaty. The Vienna regime was therefore incomplete and should be supplemented by provisions clarifying the issues referred to. That was particularly important in the case of norms of *jus cogens*, since reservations conflicted not just with the treaty concerned, but with a higher-level, pre-existing norm which the treaty embodied.

56. It also seemed wrong to condone the practice employed by some States of knowingly making reservations which ran counter to the core provisions of the treaty so that they could claim to be parties to the treaty while actually using it for their own interests. A related problem was that of declarations, which were sometimes used as a smokescreen for actual reservations. In that connection, it would be useful if the Commission would analyse the differences between declarations and reservations.

57. The question of reservations assumed critical importance in the case of human rights treaties. Rather than tackling directly the core issue of which reservations conflicted with the object and purpose of a treaty, the Commission had chosen a procedural approach, namely, referring the matter to the human rights treaty monitoring bodies. Those bodies had, in fact, acted for several years as guardians of the treaties concerned; acknowledgement of their recommendatory powers and encouragement of the dialogue between them and reserving States (Preliminary Conclusions 5, 9 and 10) were of the utmost importance.

58. That approach was, however, a partial one at best. In fact, the problem of inadmissible reservations was present in any type of treaty, and was especially serious in those that dealt with regimes that must be applied concretely and universally, such as the United Nations Convention on the Law of the Sea. She therefore hoped that the conclusions reached by the Commission would not preclude future study of the question of which reservations were contrary to the object and purpose of a treaty. Furthermore, she strongly favoured the adoption by the Commission of the doctrine of permissibility.

59. With regard to chapter VI of the report, she was confident that, on second reading, the Commission would re-examine the most crucial and sensitive aspects of the draft articles on State responsibility, namely, the questions of State crimes and countermeasures.

60. She had no difficulties with the legal concept of State crimes as defined in draft article 19, paragraph 2; Portuguese legislation provided for the attribution of criminal responsibility to legal persons, including the State, and she saw merit in the future development of the concept of international criminal responsibility. Nevertheless, the draft articles made no mention of any specific consequences attaching to a crime, as opposed to a mere wrongful act. That situation should be remedied in the future.

61. As to countermeasures, she was in favour of a legal regime that would minimize differences in the ability of States to take or respond to them. In that connection, she attached importance to the Commission's role in the progressive development of international law, as referred to in Article 13, paragraph 1, of the Charter.

62. Turning to chapter VII of the report, she concurred with the Working Group's recommendation that the Commission should proceed speedily with the completion of the draft articles on "prevention". The study of prevention, however, was merely an introduction to the crux of the topic, namely, the consequences of the acts in question. While she welcomed legal solutions which required States to take preventive action to avoid harm, such as making environmental impact assessments, she deemed it essential to establish the duty to pay compensation if harm occurred. She therefore strongly supported draft article 4, which emphasized the importance of preventive action, draft article 1 (b), which dealt with activities that did not normally entail risk but that nonetheless caused harm, and draft article 5, concerning the duty to pay compensation when transboundary harm occurred, with the understanding that it applied to the environment. She also stressed the need to strengthen the dispute settlement mechanisms.

63. She believed that the topic should be dealt with as a unit, including, but not limited to, the question of prevention. As to how the topic was related to that of State responsibility, a clearer distinction should be made between

situations involving strict liability and those involving responsibility.

64. Concerning chapter VIII of the report, she concurred with the approach proposed, namely, that the topic should be limited to codification of secondary rules and should not address the consequences of direct injury caused by one State to another. She would be grateful, however, if the question of persons in a territory under the administration of a State could be addressed. In addition, she strongly believed that the topic should include the protection claimed by international organizations for the benefit of their agents, on the ground both of the precedents existing in international case-law and of the basic fairness of such protection.

65. As to chapter IX of the report, she concurred with the general approach, scope and content of the study proposed by the Working Group and its special interest in the question of recognition of States and of the status of territories, while believing that it was premature to decide on the final form that the study should take.

66. Lastly, with regard to chapter X, she expressed appreciation to the Commission for its concise and well-organized report. The inclusion of chapter III and of the Commission's programme of work for the remainder of the quinquennium was particularly welcome.

67. She strongly supported the convening of periodic open-ended informal meetings between members of the Commission and the Sixth Committee, particularly at the outset of the Commission's work on a topic. As to the low number of replies received to questionnaires, she believed that that was due to a number of factors, including short deadlines and a lack of experts, rather than to a lack of interest. The questionnaires could be made more user-friendly if they were broken down into several sub-topics with different deadlines assigned to each one.

68. **Mr. Win** (Myanmar) said that the Government of Myanmar was endeavouring to update and modernize the legal system that had been in force in that country since independence 50 years earlier, and to promote the rule of law, especially in those territories that had only recently achieved peace and stability following the cessation of armed insurgencies.

69. The main topics considered by the Commission were of great relevance in the light of contemporary international reality, in which new States were coming into being, divided States were being reunited and the globalization of trade and technology had brought the world's people into closer contact than ever before. For that reason, he welcomed the adoption of General Assembly resolution 51/160 and fully supported the work of the Commission.

70. **Mr. Kerma** (Algeria) noted that, at its forty-ninth session, the International Law Commission had focused primarily on the topic of the nationality of natural persons in relation to the succession of States, as recommended by the General Assembly. He commended the Working Group on the topic for having completed its consideration of the draft articles on first reading in a relatively short time, thanks largely to the efforts of the Special Rapporteur. Recent international developments had lent added importance to the highly sensitive question of nationality which, while a sovereign prerogative of States, also had direct implications for the international order and therefore called for some regulation.

71. A reading of some provision clearly showed the importance attached by the Commission to achieving a balance between the legitimate interests of individuals and the right of individual States to determine their own legislation on the granting of nationality. The Commission was to be commended for the importance attached to observance of the fundamental rights of individuals, as reflected in its efforts regarding prevention of statelessness. In that regard, article 1 was one of the most important in the draft because it emphasized the right of every individual to a nationality, including in the event of a succession of States.

72. In keeping with its pragmatic approach to the right to nationality, the Commission had applied objective criteria based on actual situations. However, those criteria might in some cases prove inadequate and give rise to problems. In view of the need for a precise definition of the link which must exist between the individual and the State of which he wished to be a national, as well as the parameters of the concept of habitual residence, the risk of conflict between the desire to preserve family ties and the right of each individual to choose his own nationality without constraint had not been given sufficient consideration. Care should therefore be taken to avoid any arbitrary or discriminatory measures.

73. Dual or multiple nationality, although not a universally accepted concept, was becoming an increasingly common phenomenon calling for a more pragmatic examination. It was a question which sometimes gave rise to highly complex disputes between States. In that regard, he disagreed with the approach adopted by the Commission in proposing ways of preventing disputes. In many cases, such disputes were dealt with under bilateral agreements between States. That concern had been raised by the Commission, in particular in the provisions on consultation and exchange of

information between States. His delegation had noted with appreciation the realistic approach adopted by the Commission in attempting to safeguard the legitimate interests of States, while at the same time affording protection to individuals who, in the event of disputes, were generally deprived of their rights.

74. His delegation would prefer the draft articles to be in the form of a declaration, but was prepared to join any consensus which might emerge from the debate in the Sixth Committee and comments submitted by States. The essential thing was to have a text which enjoyed the widest possible acceptance.

75. Reservations to treaties had become part and parcel of international legal practice and had to a large extent contributed to the wider acceptability of multilateral treaties. The question of reservations was, by definition, a complex one, involving not only technical considerations, but also political ones which immediately gave rise to legitimate concerns on the part of States. In that respect, his delegation shared the preliminary conclusion of the International Law Commission that the object of the treaty alone was the most important criterion in determining the legitimacy of reservations. Moreover, he saw no need for a distinction between human rights and other treaties.

76. The creation of monitoring mechanisms under human rights treaties raised numerous difficulties as to the method to be used in determining the legitimacy of reservations, as well as to the risk of coming into conflict with conventional monitoring procedures employed by the contracting parties to the treaties in question. Such monitoring bodies should be authorized to determine the permissibility of reservations only if such authority had been expressly conferred on them by the treaty in question.

77. The Commission continued to encounter many difficulties in considering the question of State responsibility, which was an indication of the topic's complexity. The draft articles on the topic employed a number of concepts, such as international crimes, the distinction between international crimes and international delicts, and the ranking of unlawful acts of States, on which there was as yet no consensus. The Commission's task was made arduous and complex by the many political implications and by the lack of international bodies able to qualify a State act as a crime.

78. The other major difficulty lay in the equally sensitive area of countermeasures. In his view, the aim should be to prevent the escalation of measures and countermeasures and, to regulate their use in an objective and restrictive manner.

79. Regarding injurious consequences arising out of acts not prohibited by international law, his delegation urged the Working Group on the topic to persevere in its efforts to overcome the conceptual and theoretical difficulties involved. One principle which did appear to enjoy consensus was that of the right of victims of transboundary damage to appropriate compensation. That question would continue to occupy the attention of the Commission, which would not adopt a final position until it had received the comments of States, as well as any information they deemed relevant.

80. He welcomed the Commission's efforts to improve the efficiency of its methods of work with a view to completing all the draft texts before it by the end of the quinquennium. It had already shown itself capable of completing some drafts efficiently and rapidly. His delegation also shared the view of the Chairman of the Commission regarding the need for closer cooperation between the Commission, other United Nations organs and other bodies concerned with the development of international law.

81. **Mr. Politi** (Italy) said that the Special Rapporteur's second report on reservations to treaties gave a comprehensive outline of the subject. The International Law Commission considered that the 1969 Vienna Convention on the Law of Treaties was flexible enough to suit the requirements of all treaties, including human rights treaties, and that it struck a satisfactory balance between preserving the integrity of the treaty and assuring universal participation.

82. He agreed that the criterion of the object and purpose of the treaty was essential for determining the permissibility of reservations, but the solutions provided by the Convention with regard to the effects of impermissible reservations were far less convincing in the case of human rights treaties. Practice had shown that the inter-State system was inadequate for instruments characterized by the indivisible nature of the obligations they enshrined, and could even therefore enable States to become parties to human rights treaties without really committing themselves. On the other hand, the Vienna regime was so general as not to exclude the establishment of special regimes to fill any gaps. In his view, human rights treaties were by their very nature a special category that merited further in-depth study by the Commission.

83. He agreed with the Commission's conclusions on, and the Special Rapporteur's analysis of, the role of human rights treaty monitoring bodies. While their tendency to determine the permissibility of reservations could be justified on political grounds, from the legal point of view it clearly exceeded their competence unless such power was

conferred by the constituent instrument of the regime in question. He saw no contradiction between paragraphs 5 and 7 of the Commission's Preliminary Conclusions. Recognizing the competence of monitoring bodies to comment and make recommendations on the permissibility of reservations need not prevent States parties from extending the monitoring bodies' competence to determine permissibility in the future.

84. He agreed with the work plan devised by the Commission for the topic of State responsibility pending submission of comments by States. There was a sound legal basis for the distinction between international crimes and other internationally wrongful acts, and it was regrettable that reservations continued to be expressed on the very concept of international crime. Furthermore, that distinction meant that specific legal consequences applied to the relationship between a wrongdoing State and an injured State in the context of international crimes. On the basis of those premises, it was not for a single State to determine that an international crime had been committed, but for organs representing the international community, or international judicial bodies.

85. Efforts to clarify the rules of international law in the field of international liability for injurious consequences arising out of acts not prohibited by international law should be pursued with renewed determination, particularly in the light of the persistent uncertainty surrounding so-called ultra-hazardous activities and the prevention and consequences of transboundary environmental damage. While he agreed with the Commission's decision to deal with the question of prevention of transboundary damage before finalizing its views on international liability, international liability remained the core issue of the topic and needed to be adequately addressed by the Commission.

86. He commended the efforts of the Working Group on diplomatic protection to clarify the scope of the topic. He agreed that the topic was primarily concerned with the basis, conditions, modalities and consequences of diplomatic protection, particularly claims brought by States on behalf of their nationals against another State. He also believed that recourse to the criterion of effective nationality was crucial for resolving the issues arising from special cases, such as cases of double nationality. Even when an individual declined diplomatic protection from his or her state of nationality, that State could nevertheless exercise diplomatic protection, as such protection was a right of the State. The issue of function protection was closely linked to that of diplomatic protection. However, the protection claimed by international organizations for their agents should not be included in the topic to be addressed by the International Law Commission, but should be dealt with in a separate study.

87. He was satisfied with the general approach to the subject of unilateral acts of States proposed by the Working Group. The work should be initially focused on unilateral acts of States that were intended to produce legal effects. He wondered whether it might not be advisable to include an analysis of the various issues related to acquiescence; increasingly, States were not explicitly expressing their positions on specific events with legal consequences. Identifying the characteristics of acquiescence and the legal effects deriving therefrom could be of significant help in systematizing one of the most complex aspects of unilateral acts. However any decision with regard to the final form of the study on the topic, would be premature.

88. **Mr. Mikulka** (Special Rapporteur on nationality in relation to the succession of States) said that although the preliminary nature of the comments made by delegations meant that no final conclusions could as yet be drawn, there nevertheless appeared to be a consensus on a number of issues. He had been particularly encouraged by the support expressed for the Commission's efforts to define a right to nationality in the context of the succession of States, particularly as expressed in article 1. There had also been a very positive reaction to the provisions on the prevention of statelessness. The Commission's proposal regarding the obligation to take measures appeared to be line with the expectations of States and to provide a realistic framework for the draft articles.

89. Many delegations had emphasized the need to maintain the balance between the interests of States and those of individuals. That had been a constant concern of the Commission. As at the fifty-first session, delegations also appeared to see merit in the Commission's approach which sought to combine the traditional issues relating to the right to nationality with considerations related to the protection of human rights. There appeared to be wide support for presenting the draft articles in the form of a declaration, although some delegations, while not objecting to a declaration by the General Assembly, wished work to continue with a view to the adoption of a binding instrument.

90. While the reaction to the Commission's work on the question of nationality had been generally positive, some interesting criticisms had been made on various aspects of the draft articles. Those criticisms would be taken into account, and he was confident that the Commission would give very careful consideration to the aspects in question. There appeared to be a difference of views among States themselves on some substantive questions, such as the role

to be given to the criterion of habitual residence in drafting rules on the granting of nationality. While there appeared to be majority support for the approach proposed by the Commission, some delegations had drawn attention to the disadvantages of the general application of that criterion. Some delegations also appeared to have difficulty with the provisions on the right of option as drafted by the Commission, and questions had been asked about the usefulness of including certain draft articles.

91. Some doubts expressed by delegations might be attributed to an interpretation of the draft articles which differed from that of the Commission and could therefore be quickly dispelled by a more detailed explanation on the part of the Commission. Others might call for more detailed analysis and a review of the draft articles in question.

92. It would be premature at the current stage to say whether or how the draft articles should be revised on second reading. The discussion in the Sixth Committee was only one of the channels of communication between the Commission and States. States could also submit their comments in writing, in accordance with the procedure proposed in paragraph 43 of the Commission's report (A/52/10). He expressed the hope that the Commission would have all the necessary information to enable it to proceed with the second reading of the draft articles at its fifty-first session.

93. In conclusion, he thanked all those Governments who had responded to the Secretary-General's invitation to submit information regarding their national legislation, the decisions of national courts and diplomatic and official correspondence to facilitate the task of the Commission and invited all other Governments to do so as soon as possible.

94. **Mr. Pellet** (Chairman of the International Law Commission), speaking in his capacity as Special Rapporteur on reservations to treaties, said his hopes of stimulating a true debate on the issue of reservations to treaties had not been entirely disappointed. The large number of speakers on the topic showed that it had been well chosen and therefore that the International Law Commission's methods of selecting topics were not as terrible as they were sometimes made out to be. Delegations generally seemed to endorse the approach he had suggested and to agree that the Vienna regime should be the starting point and basis for future work on the issue. The majority of delegations were in favour of preserving the unity of the regime, which would apply to all categories of treaties, including human rights treaties. The view had been expressed that, since the Vienna rules were deliberately optional in nature, it would be useful to make exceptions for certain treaties, which would of course be quite compatible with the Vienna regime. He therefore proposed to prepare some model clauses which would apply not only to the area of human rights but also to other areas such as disarmament and environmental protection.

95. He was particularly gratified to note that the great majority of speakers were in favour of drafting a guide to practice. The preference of some delegations for a binding instrument seemed to him to offer more disadvantages than advantages.

96. He had been struck by the careful reasoning used by delegations to justify their approval of or objections to particular paragraphs of the Commission's Preliminary Conclusions. Those comments would be invaluable when the Commission took the matter up again after receiving comments from human rights bodies and other treaty-monitoring bodies. In that connection, he welcomed the Sixth Committee's readiness to consult with other bodies with an interest in the codification and progressive development of international law, and saw no problem in consulting with other monitoring bodies, as had been suggested by several delegations.

97. He regretted that some speakers had opposed the idea that the Preliminary Conclusions might take the form of a resolution of the Committee. A resolution would be nothing more and nothing less than an expression of the collective view, and might actually be as useful as, for example, the general comments of the Human Rights Committee. Nor could he see any legal obstacles to such an initiative. Perhaps those delegations that considered the Preliminary Conclusions to be premature had misunderstood the Commission's reasons for adopting them; they were intended not as a draft for the future guide to practice, but merely to focus the Committee's attention on the particular problems raised by reservations to normative treaties and, in particular, human rights treaties. It might appear more logical to address those problems at the end of the exercise, but the debate on reservations was already well advanced in the human rights bodies, and if the International Law Commission and the Sixth Committee, as organs of general international law, wished to have an input in that debate, they needed to make their voice heard, even in the form of preliminary comments that could be reviewed later. Moreover, if the International Law Commission did not wish to retreat into an ivory tower, but to consult effectively with both States and treaty-monitoring bodies, the consultations could not be deferred until a late stage of the Commission's work on reservations to treaties without delaying the completion of that work.

98. In general, delegations appeared to find the Commission's Preliminary Conclusions sufficiently well

balanced, although some had supported the position of certain human rights bodies which considered that a State which was the author of an impermissible reservation was bound by all the provisions of a treaty, a view that was not accepted by the International Law Commission as a whole. However, many more States had expressed their commitment to consensual principles. Some States had gone so far as to challenge the right of the human rights treaty monitoring bodies to take a position on the permissibility of reservations to treaties. In his opinion, that was rather an extreme view, and he was gratified to know that only a tiny minority of States appeared to share it.

99. He had taken note of the major concerns of delegations with regard to reservations to treaties, namely: the difference between reservations and interpretative statements; the precise definition of the fundamental idea of the object and purpose of treaties; the disadvantages of having no objective mechanism to determine the lawfulness or otherwise of reservations, an issue on which he had no preconceptions; and the effects of impermissible reservations and the effects of objections to reservations. He would address those issues in his next report.

The meeting rose at 1 p.m.